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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

PAUL AVILA III,

Defendant and Appellant.

G051707

(Super. Ct. No. 14NF2846)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, James A. Stotler, Judge. Affirmed.

Thea Greenhalgh, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Scott C. Taylor and Paige B. Hazard, Deputy Attorneys General, for Plaintiff and Respondent.

Paul Avila III appeals from a judgment after a jury convicted him of two counts of aggravated assault with a deadly weapon. Avila argues insufficient evidence supports his convictions. His contentions have no merit, and we affirm the judgment.

FACTS

One July afternoon, Silas Perkins walked into a restaurant to have lunch. As he walked in, Perkins saw Avila grab the tip jar and run out the door. After the restaurant owner yelled for help, Perkins ran after Avila. Perkins caught Avila, tackled him in the street, and held him on the ground. Avila complained the asphalt was burning him and he could not breathe. David Orellana, Jesse Orellana, and Christian Mendez were working across the street from the restaurant and saw the commotion. The three men came over where Perkins was holding Avila and told Perkins to get off Avila. Afterwards, the four men sat with Avila waiting for police.

After being escorted to the curb, Avila jumped up with a knife and swung it towards Perkins. No one was injured. Avila ran across the street with the knife in his hand. A John Doe got out of his car and tried to stop Avila. Doe grabbed Avila, and Avila slashed him with the knife. Doe screamed Avila had a weapon, and Avila stabbed him.

Avila ran away down an alley and Perkins, who had given chase, followed. When Avila saw Perkins, he again drew his knife. Avila slashed the knife towards Perkins. Perkins sucked in his stomach to avoid the weapon, and Avila missed cutting Perkins by an inch. Perkins was not wearing his prescription glasses at the time of the incident.

Avila ran back to the street, and Sergeant Michael Hines arrived and arrested him. Police recovered Avila's knife, which he discarded during the chase. Avila's knife had blood on it. Avila's hand was bleeding from a cut on his finger. The knife was not tested for DNA.

An information charged Avila with two counts of aggravated assault with a deadly weapon (Pen. Code, § 245, subd. (a)(1)¹ (counts 1 and 2)), and one count of shoplifting (§ 459.5, subd. (a) (count 3)). The information alleged Avila suffered two prior strike convictions (§§ 667, subds. (d) & (e)(2)(A), 1170.12, subds. (b) & (c)(2)(A)), two prior serious felony convictions (§ 667, subd. (a)(1)), and four prior prison terms (§ 667.5, subd. (b)). The jury convicted Avila of counts 1 and 2 but acquitted him of count 3. At a bifurcated proceeding, the trial court found true the two prior strikes and the two prior serious felony convictions. The court found not true two of the four alleged prior prison terms, finding the remaining to be true. The court exercised its discretion and struck one of the prior strikes and two of the prison priors. The court sentenced Avila to 18 years in prison as follows: 8 years for count 1, six years for count 2 to be served concurrent to count 1, and five years each for the two prior serious felony convictions.

DISCUSSION

Avila argues insufficient evidence supports his convictions for counts 1 and 2. We will address his claims below.

Sufficiency of the Evidence

“In reviewing a claim for sufficiency of the evidence, we must determine whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime or special circumstance beyond a reasonable doubt. We review the entire record in the light most favorable to the judgment below to determine whether it discloses sufficient evidence—that is, evidence that is reasonable, credible, and of solid value—supporting the decision, and not whether the evidence proves guilt beyond a reasonable doubt. [Citation.] We neither reweigh the evidence nor reevaluate the credibility of witnesses. [Citation.] We presume in support of the judgment the existence of every fact the jury reasonably could

¹ All further statutory references are to the Penal Code, unless otherwise indicated.

deduce from the evidence. [Citation.] If the circumstances reasonably justify the findings made by the trier of fact, reversal of the judgment is not warranted simply because the circumstances might also reasonably be reconciled with a contrary finding. [Citation.]” (*People v. Jennings* (2010) 50 Cal.4th 616, 638-639 (*Jennings*).)

Section 245, subdivision (a)(1), states: “Any person who commits an assault upon the person of another with a deadly weapon or instrument other than a firearm shall be punished by imprisonment in the state prison for two, three, or four years, or in a county jail for not exceeding one year, or by a fine not exceeding ten thousand dollars (\$10,000), or by both the fine and imprisonment.” “The statute prohibits an assault by means of force *likely* to produce great bodily injury, not the use of force which does *in fact* produce such injury. While . . . the results of an assault are often highly probative of the amount of force used, they cannot be conclusive.” (*People v. Muir* (1966) 244 Cal.App.2d 598, 604 (*Muir*).) “[T]he question of whether or not the force used was such as to have been likely to produce great bodily injury, is one of fact for the determination of the jury based on all the evidence, including but not limited to the injury inflicted. [Citations.]” (*Ibid.*)

Count I

Avila claims Perkins’s testimony was insufficient to support his conviction on count 1 because Perkins was not wearing his glasses at the time of the crime and he insisted the weapon he saw Avila holding was a box cutter and not a knife. The record includes sufficient evidence from which the jury could reasonably conclude Avila committed an aggravated assault on Perkins. The evidence at trial established that after Avila was escorted to sit on the curb, he jumped up with a knife in his hands. Perkins testified Avila swung the knife at him from two feet away and Avila later swung the knife at Perkins in the alley, where it only missed slashing Perkins in the stomach by an inch.

Absent physical impossibility or inherent improbability, the testimony of one witness is sufficient to support a conviction. (*People v. Prunty* (2015) 62 Cal.4th 59,

89.) Witnesses saw Avila slash his knife at John Doe, the second victim. They also saw John Doe grab his arm and yell Avila stabbed him. This evidence was sufficient for the jury to determine Avila slashed his knife at Perkins at least once while in close proximity to him and conclude Avila had the ability to apply force likely to produce great bodily injury.

The jury heard testimony Perkins was not wearing his prescription glasses and that he was confused as to the type of weapon. Ultimately, the jury did not find these facts damaging and credited Perkins' testimony. Essentially, Avila asks us to reweigh the evidence. That we cannot do. (*Jennings, supra*, 50 Cal.4th at pp. 638-639.)

Avila also argues Perkins' testimony was inherently unreliable and physically impossible. Although Perkins was not wearing his prescription glasses, there was no testimony establishing Perkins was incapable of seeing what Avila did on the day of the crime. Additionally, Perkins' testimony was corroborated by eyewitness testimony stating Avila had a knife.

Finally, Avila suggests the fact Perkins was not stabbed or injured by the assault demonstrates the force used was not sufficient to cause great bodily injury. Avila also claims the lack of injury to Perkins demonstrates an absence of evidence normally expected in an assault case. The jury heard testimony Avila had a knife, he slashed the knife towards Perkins, and he used the knife to stab Doe. The question of whether or not this force was such as to have been likely to produce great bodily injury was properly before the jury and the jury concluded it was. (*Muir, supra*, 244 Cal.App.2d at p. 604.)

Avila slashed the knife many times and came so close to Perkins he had to suck in his stomach to avoid being stabbed. Avila was also equipped and positioned to attack, as evidenced by him brandishing the knife and swinging it multiple times towards Perkins. Although Avila did not injure Perkins, two witnesses heard John Doe scream he was stabbed and saw him grab his arm. On these facts, it was reasonable for the jury to determine Avila had a present ability to use actual violence against Perkins and find that

Avila's force was likely to produce great bodily injury. Thus, sufficient evidence supports Avila's conviction for count 1.

Count 2

Avila contends Doe's spontaneous statement Avila cut him was insufficient evidence of Avila's assault on Doe. He is incorrect. The record contains sufficient evidence from which the jury could reasonably conclude Avila assaulted Doe. Witnesses testified to the following: Avila was holding a knife as he ran towards Doe; Avila slashed the knife towards Doe; Doe grabbed Avila; Doe screamed he had been stabbed; and Doe grabbed his arm. As already discussed, the evidence also showed Avila attempted to slash Perkins.

Avila argues Doe's statement about being stabbed was insufficient evidence to support an inference Avila assaulted him. Avila insists he was unable to confront Doe at trial, and as a result, the statement cannot be considered substantial evidence because it was uncorroborated and thus unreliable. Avila contends no evidence established he actually cut Doe.

Avila is correct that "hearsay evidence alone 'is insufficient to satisfy the requirement of due process of law, and mere uncorroborated hearsay does not constitute substantial evidence. [Citation.]" [Citations.]" (*In re Lucero L.* (2000) 22 Cal.4th 1227, 1244-1245.) Here, however, hearsay evidence alone was not the basis of Avila's conviction. As outlined above, additional witness testimony corroborated the spontaneous statement and established Avila had a knife, slashed it at Doe, a knife was recovered at the scene, and Avila also swung a knife at Perkins.

Avila does not claim the spontaneous statement was improperly admitted into evidence nor does he assert a claim of ineffective assistance of counsel for failing to object to the introduction of this testimony. Instead, Avila appears to claim Doe's statement was unreliable and should not have been credited by the jury. It is not this court's function to make such a witness credibility determination. (*Jennings, supra*,

50 Cal.4th at p. 638.)

Avila also claims that there was an absence of evidence normally expected in assault cases for count 2. Avila maintains the record is missing evidence of the likelihood that the force applied or attempted to be applied to Doe would result in great bodily injury. At trial the evidence demonstrated Avila had a knife, he slashed the knife towards Perkins, slashed the knife towards Doe, and stabbed Doe with the knife. Based upon this evidence, the jury could reasonably determine that the force used by Avila against Doe was likely to produce great bodily injury. (*Muir, supra*, 244 Cal.App.2d 598, 604.)

Thus, based on the entire record, there is sufficient evidence supporting Avila's convictions of counts 1 and 2 under both the federal and state constitutional due process clauses. (*Jackson v. Virginia* (1979) 443 U.S. 307, 318-319; *People v. Johnson* (1980) 26 Cal.3d 557, 576-577.)

DISPOSITION

The judgment is affirmed.

O'LEARY, P. J.

WE CONCUR:

FYBEL, J.

IKOLA, J.